IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 01-3066 & 01-3157

PATRICK WRIGHT,

Petitioner-Appellee / Cross-Appellant,

v.

JONATHAN WALLS,

Respondent-Appellant / Cross-Appellee.

Appeals from the United States District Court
for the Central District of Illinois.
No. 93 C 2105—**Harold A. Baker**, *Judge.*

ARGUED FEBRUARY 26, 2002—DECIDED APRIL 24, 2002

Before FLAUM, *Chief Judge*, and EASTERBROOK and WILLIAMS, *Circuit Judges.*

FLAUM, *Chief Judge*. A jury convicted Patrick Wright of murder, attempted murder, attempted rape, armed robbery, home invasion and residential burglary. The trial court sentenced him to death. Following the exhaustion of all state remedies, Wright petitioned for a writ of habeas corpus alleging numerous constitutional errors at both the trial and sentencing phases. The district court vacated Wright's death sentence because the sentencing judge impermissibly failed to consider mitigating evidence related to Wright's

traumatic childhood. The district court also affirmed Wright's conviction, holding that Wright did not receive ineffective assistance of counsel at trial.[1] Both Wright and the State of Illinois appeal. For the reasons stated herein, we affirm.

I. Background

On June 6, 1983, Wright entered Carol Specht's apartment, put a knife to her throat and attempted to rape her. After binding and gagging Carol, Wright proceeded through the rest of the Spechts' home when he discovered Carol's daughter, Connie. Wright forced Connie into her mother's bedroom where he sexually abused her. Wright later slashed Connie's throat multiple times and stabbed Carol in the back. Connie survived, but Carol died.[2] Wright was charged with murder, attempted murder, attempted rape, armed robbery, home invasion and residential burglary.

At trial, Wright's counsel did not contest the fact that Wright committed the crimes charged. Instead, trial counsel argued that Wright suffered from a mental disease involving a fetish for women's shoes. The sole evidence offered at trial supporting this theory was Wright's testimony that he had a women's shoe fetish, that he suffered from the fetish since the age of seven, that his adoptive mother beat him because of his mental impairment, and that he had been institutionalized in various mental hospitals since the

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[1] The district court addressed seven distinct claims in its opinion; however, the parties raise only two on appeal.

[2] For a more thorough recitation of the facts of Wright's crime, *see People v. Wright*, 490 N.E.2d 640, 642-44 (Ill. 1985). We have recounted only those facts necessary for the disposition of this appeal.

age of 13. Wright also testified, contrary to his taped confession, that he had entered the Spechts' apartment seeking women's shoes for sexual gratification. Dr. William Fowler testified for the State in rebuttal. He stated that Wright did not suffer from a mental disease at the time of the offense, but rather suffered from a non-pathological psychosexual disorder. The trial court provided the jury with general verdict forms, including verdicts of not guilty, not guilty by reason of insanity, guilty but mentally ill ("GBMI"), and guilty for each of the offenses. The jury found Wright guilty of all the crimes charged.

Wright waived a sentencing jury. At the sentencing hearing, Wright offered the testimony of Dr. Arthur Traugott, who opined that although Wright was able to appreciate the wrongfulness of his acts, Wright's shoe fetish controlled his lifestyle and was the cause of prior incarceration and institutionalization. The sentencing judge ultimately imposed the death penalty. Before doing so, however, the sentencing judge commented extensively on the factors that he would—and would not—consider in determining an appropriate sentence. Initially, the court focused on Wright's traumatic childhood, stating:

> I don't think any reasonable person who has heard all of the evidence in this case can feel anything but sympathy for the pathetic creature, Patrick Wright, who has been paraded through the courtroom in the trial of this case. He is a man who has wandered the forty wretched years of his life from institution to institution, from prison to prison; the evidence indicating that his fetish for women's shoes being perhaps the one and only purpose for his life.

After acknowledging Wright's "pathetic" history, the sentencing judge made three statements giving rise to the current appeal. First, the sentencing judge noted that "sympathy for the defendant [was] not an appropriate consider-

ation" in determining Wright's sentence. Second, the judge listed all of the factors that he would exclude from the death penalty calculus:

> To repeat in part, any matters dealing with sympathy, outrage, who the victim was, all the matters that I just mentioned have no bearing on whether the defendant shall receive the death penalty. And again, I note for the record that I have cited them so the record is clear that I have rejected them, and I have disregarded them in making my decision.

Third, in weighing the mitigating and aggravating circumstances according to Illinois law, the sentencing judge stated that he was unable to "determine the existence of any mitigating factors within or without the statute with the exception of [extreme mental emotional disturbance at the time of the crime.]"

Wright appealed his conviction and sentence directly to the Illinois Supreme Court. In his appeal, Wright raised eight separate issues, only one of which is relevant to this appeal. Wright argued that in imposing the death sentence, the sentencing court failed to consider all of the mitigating evidence presented by Wright, including evidence related to his troubled youth. The Illinois Supreme Court affirmed Wright's death sentence. The Court first acknowledged that lower courts must consider "any mitigating facts in the record of the trial as well as any which the defendant offers at the sentencing hearing." *People v. Wright*, 490 N.E.2d 640, 656 (Ill. 1985) ("*Wright* I") (citing *People v. Lewis*, 88 Ill. 2d 129, 144 (1981)). However, the Illinois Supreme Court ruled that the sentencer took account of all of the mitigating evidence because (1) the State specifically requested the court to consider all of the evidence presented during trial, and (2) the sentencing judge's comments that he found one mitigating factor—extreme emotional disturbance at the time of the crime—indicated that he consid-

ered "the defendant's troubled youth and its contribution, if any, to the mental disturbance existing at the time the crime was committed." *Id.* at 656.

Following the exhaustion of all appeals and applications for post-conviction relief in state court,[3] Wright petitioned for a writ of habeas corpus based upon numerous arguments. The current appeal deals with two of them. Wright first claimed that the sentencer's comments during sentencing conveyed a misapprehension of the law that precluded him from considering evidence of Wright's traumatic childhood in mitigation. Wright also asserted that trial counsel was ineffective for failing to argue, investigate and introduce during the liability phase evidence of Wright's mental health problems. Although counsel had investigated Wright's mental health history, Wright relied on approximately 50 pages of additional medical records obtained after trial that indicated limited intelligence, psychiatric drug use, and severe physical abuse by both his natural and adoptive parents.

The district court granted the writ with respect to Wright's death sentence, holding that the trial judge's failure to consider as mitigation Wright's traumatic childhood

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[3] Wright initially filed for post-conviction relief in Illinois State court. That petition was denied without a hearing, a decision that the Illinois Supreme Court affirmed on appeal. *See People v. Wright*, 594 N.E.2d 276 (1992) ("*Wright* II"). At that point, Wright petitioned for a writ of habeas corpus in federal court. Shortly thereafter, however, Wright filed a second amended post-conviction petition in state court and moved the district court to stay the proceedings pending exhaustion of state court remedies. The Illinois trial court eventually dismissed Wright's second amended petition. Wright again appealed to the Illinois Supreme Court, which affirmed the dismissal. *See People v. Wright*, 723 N.E.2d 230 (Ill. 1999) ("*Wright* III").

and mental health problems violated *Eddings v. Oklahoma*, 455 U.S. 104 (1982). The district court reasoned:

> [T]he judge specifically stated that he could discern no mitigating factors except for [Wright's] extreme emotional disturbance at the time he committed the offense. But [Wright] presented evidence of a horrible childhood; surely that qualifies as mitigation. If the judge considered this evidence, as he was required to do, why would he say that no mitigating factors existed besides [Wright's] emotional disturbance at the time of the crime? Simply put, he would not. He might find the mitigation of little weight, but he would not say that it did not exist. To derive any other meaning from his plain words requires tortuous reasoning.

Wright v. Cowan, 149 F. Supp. 2d 523, 537-38 (C.D. Ill. 2001).

The district court denied relief for Wright's ineffective assistance of counsel claim. Initially, the district court ruled that Wright had procedurally defaulted certain aspects of the claim for failing to raise it before the Illinois State courts. Specifically, the court noted that in his first petition for post-conviction relief, Wright did not argue that counsel was ineffective for focusing on Wright's alleged insanity, as opposed to pursuing a GBMI verdict. Because the Illinois Supreme Court held that Wright had waived the issue, and because that was an adequate and independent state ground, the district court limited its ineffectiveness inquiry to the issue of omitted evidence and did not address the wisdom of trial counsel's strategy to pursue exclusively an insanity defense. With these parameters in place, the district court held that although trial counsel was not perfect, Wright could not satisfy the rigorous standards of *Strickland v. Washington*, 466 U.S. 668 (1984). *Wright*, 149 F. Supp. 2d at 532-34. Both parties appeal.

II. Discussion

We note that the Antiterrorism and Effective Death Penalty Act ("AEDPA") does not apply in the present case because Wright filed his petition for a writ of habeas corpus prior to the AEDPA's effective date. *See Lindh v. Murphy*, 521 U.S. 320, 336 (1997); *Everett v. Barnett*, 162 F.3d 498, 500 (7th Cir. 1998). Accordingly, we apply pre-AEDPA standards to this appeal: we presume correct the state court's determination of historical factual issues, *see Porter v. Gramley*, 112 F.3d 1308, 1316 (7th Cir. 1997), and we review *de novo* questions of law or mixed questions of law and fact considered by state courts. *Shasteen v. Saver*, 252 F.3d 929, 933 (7th Cir. 2001).

A. Vacation of Death Sentence

The first issue we must address is whether the district court properly vacated Wright's death sentence because the sentencing judge impermissibly refused to consider proposed mitigating evidence related to Wright's background. Wright argues that this ruling was correct because the sentencing court's comments unambiguously reveal that he could discern no mitigating factor beyond Wright's extreme emotional disturbance at the time of the crime. According to Wright, this necessarily means that the sentencing judge did not consider Wright's traumatic history. In response, the State maintains that although the judge had to entertain Wright's traumatic background, he was not required to grant that evidence any amount of weight. The State interprets the sentencing court's remarks as considering but rejecting Wright's mitigating evidence.

Both parties agree that *Eddings v. Oklahoma*, 455 U.S. 104 (1982), and its progeny provide the governing legal principles in this case. In *Eddings*, the Supreme Court held that because imposition of a death sentence demands individualized consideration of each defendant's circum-

stances, the sentencing court must admit and consider all relevant mitigating evidence. *Id.* at 114-15 ("Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, *as a matter of law*, any relevant mitigating evidence.") (emphasis in original); *Lockett v. Ohio*, 438 U.S. 586, 604 (1982) ("[W]e conclude that the Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.") (emphasis in original).

Because the Illinois Supreme Court considered Wright's *Eddings* argument on direct appeal, we must examine the State Court's disposition of the issue. The Illinois Supreme Court held that the sentencing court necessarily considered Wright's history because the State specifically asked the judge to take into account all of the evidence presented during the liability phase. *Wright I*, 490 N.E.2d at 656. The Illinois Supreme Court also held that the sentencer's finding of one mitigating factor (extreme emotional disturbance at the time of the crime) "indicate[d] that the court did consider the defendant's troubled youth and its contribution, if any, to the mental disturbance existing at the time that the crime was committed." *Id.* In our view, the Supreme Court of Illinois' holding that the sentencing court "considered all potential mitigating facts in the record, including those adduced at trial," *id.*, as well as the Court's proffered justifications for that holding, do not withstand scrutiny. Foremost, the Illinois Supreme Court never addressed the truly critical statements in this case, i.e., those where the sentencing judge set forth the specific evidence that he would not consider in determining Wright's sentence. The fact that the State requested the sentencer to take into account all of the evidence presented at trial is immaterial

when coupled with the specific evidence the sentencing court stated he would disregard. Had the sentencing court agreed to take into account all of the evidence at trial —and said nothing else—he may have complied with *Eddings*. *See, e.g., United States v. Mahoney*, 859 F.2d 47, 49-50 (7th Cir. 1988) (sentencing judge need not explicitly state every fact he is relying on to pass sentence). But this is not a case where the sentencer simply neglected to state for the record all of the evidence considered in mitigation.[4] Rather, this is a case where the sentencer highlighted all of the evidence he *would not consider*—including evidence of Wright's traumatic history—a practice that *Eddings* clearly prohibits, and an issue not addressed by the Illinois Supreme Court.

The sentencing judge was quite clear in what he deemed appropriate factors for consideration in determining Wright's sentence, stating that:

> any matters dealing with sympathy, outrage, who the victim was, all the matters that I just mentioned [such as evidence of Petitioner's "wretched" and "pathetic" life] have no bearing on whether the defendant shall receive the death penalty. And again, I note for the record that I have cited them so the record is clear that

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[4] It is true that some sentencing judges might deem Wright's traumatic background an aggravating—as opposed to a mitigating—circumstance. (Dissent, slip op. at 20-25) However, notwithstanding Judge Easterbrook's skepticism, the individualized assessments necessary in capital sentencing proceedings required the sentencer to take into account all of Wright's evidence, a requirement not met in this case. With due respect to Judge Easterbrook's characterization, not considering evidence—such as Wright's history, the sympathy generated from that history, who the victim was, and certain statements made to the media—is not the same as considering but affording little weight to the mitigating effects of that evidence.

> *I have rejected them, and I have disregarded them in making my decision.*

People v. Wright, No. 83-CF-70, Tr. of Sent. Hrg., at 7 (emphasis added). This is the language of exclusion—the very practice that the Supreme Court held constitutionally infirm in *Eddings*. Indeed, the sentencing judge's remarks in this case are strikingly similar to those in *Eddings*, where the judge stated that he could not "be persuaded entirely by the fact . . . that the youth was sixteen years old when this heinous crime was committed. Nor can the Court in following the law, in my opinion, consider the fact of this young man's violent background." *Eddings*, 455 U.S. at 124 (Burger, C.J., dissenting). In both cases, the sentencing judges' statements reflect the wholesale exclusion of certain evidence in determining the appropriate sentence. *Eddings* makes clear that this practice is improper because it deprives the criminal defendant of the particularized assessment necessary in capital sentencing hearings.

The sentencing judge's additional comments, particularly the court's ultimate conclusion that only one mitigating factor existed, foreclose distinct interpretations. The sentencing judge stated that he had "given great consideration to whether other mitigating factors exist," and that he was "unable to determine the existence of any mitigating factors within or without the statute with the exception [of defendant's extreme mental distress at the time of the offense.]" As the district court noted, Wright presented substantial evidence of a troubled childhood, which clearly qualifies as evidence offered by the defendant in mitigation.[5] Although

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[5] Contrary to the dissent's assertion, we do not suggest that the evidence presented by Wright was necessarily mitigating, or that the sentencer was required to afford it mitigating weight. Rather, we find that it was constitutional error for the sentencing court

(continued...)

the sentencing judge was not required to afford Wright's history any weight, he was required to consider it. To suggest that the finding of extreme mental and emotional disturbance at the time of the crime necessarily encompassed the evidence of Wright's pitiful life renders the words "at the time of the crime" meaningless. *See Wright*, 149 F. Supp. 2d at 537. The fact that the sentencer found only one mitigating factor either "within or without the statute" requires the opposite conclusion than the one reached by the Illinois Supreme Court. To find from these statements that the sentencing judge actually considered Wright's history requires "tortuous reasoning." *Id.* at 538.

In dissent, Judge Easterbrook quarrels with this analysis and argues that the sentencing judge's remarks illustrate that he considered—but afforded no weight to—Wright's mitigating evidence, including evidence describing his troubled background. However, this approach suffers from an unavoidable inconsistency. As discussed previously, the sentencing judge linked evidence related to Wright's history with other evidence he would not consider, such as sympathy, outrage, who the victim was (including her activities within the community and the recognition that she received for those activities), and certain statements Wright made to the media. If Judge Easterbrook's formulation of the sentencing judge's statements is correct, then the sentencing judge also considered but rejected sympathy, outrage, who the victim was, and statements made to the media, a practice that would have been improper. *See, e.g., People v. Bernette*, 197 N.E.2d 436, 443 (Ill. 1964) (evi-

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[5] (...continued)
affirmatively to refuse to consider a category of potentially mitigating evidence offered by the capital defendant. This case does not present the question of how the sentencing court interpreted evidence offered by Wright. Instead, it concerns the sentencing court's decision not to examine such evidence at all.

dence regarding the victim or her family improper because it bears no relationship to guilt or innocence or the appropriate punishment); *People v. Holman*, 469 N.E.2d 119, 135 (Ill. 1984) (improper to describe the victim as "unusually bright" or to state that the victim had received numerous awards); *People v. Del Vecchio*, 475 N.E.2d 840 (Ill. 1985) (jury instruction precluding consideration of sympathy or prejudice was proper). Thus, either the sentencer disregarded all of the categories of evidence mentioned, which would violate *Eddings*, or he considered but rejected all of the evidence, a course of action raising other concerns.

Perhaps recognizing this inconsistency, the state interprets the sentencer's remarks as excluding only sympathy for the defendant, a practice that the Constitution permits. *See California v. Brown*, 479 U.S. 538 (1987). While it is true that the individualized assessment regarding the appropriateness of a death sentence should not be based on an emotional response to the mitigating evidence, the sentencer must exercise great caution not to ignore the evidence giving rise to such responses. *See id.* at 545-46 (O'Connor, J., concurring). Here, the sentencing judge used language such as "will have no bearing" and "disregarded" in the context of Wright's mitigating evidence, and the sentencing judge did not limit his remarks to the emotional response generated by Wright's background. In short, the sentencer's remarks are so imbued with exclusionary language as to violate the constitutional requirements announced in *Eddings*.

Judge Easterbrook notes that cases such as *Parker v. Dugger*, 498 U.S. 308 (1991), *Wainwright v. Goode*, 464 U.S. 78 (1983), and *Rivera v. Sheriff of Cook County*, 162 F.3d 486 (7th Cir. 1998), hold that a reviewing court's characterization of what the trial judge found is one of historical fact. While that proposition is unassailable, it does not mean that state courts act correctly in every instance. Indeed, in *Parker*, the Supreme Court reversed a decision that was not

an accurate factual characterization of what transpired at sentencing. *Parker*, 498 U.S. at 318. *Parker* involved a capital sentencing judge who weighed aggravating and mitigating factors pursuant to Florida law. On appeal, the Florida Supreme Court held that the judge had erroneously relied upon two aggravating factors. However, rather than remanding the case for resentencing, the Florida Supreme Court held that the absence of any nonstatutory mitigating factors made re-weighing unnecessary and affirmed the death sentence. The Supreme Court of the United States ultimately reversed, finding that the "Florida Supreme Court erred in its characterization of the trial judge's findings, and consequently erred in its review of Parker's sentence." *Id.* at 318. *Parker* instructs appellate courts to review the entire record when evaluating a sentencing judge's comments: accurate factual characterization depends upon "an examination of the transcript of the trial and sentencing hearing, and the sentencing order." *Id.* at 320. The Supreme Court ultimately reversed because the Florida Supreme Court disregarded evidence that contradicted its factual finding. "What the Florida Supreme Court could not do, but what it did, was to ignore the evidence of mitigating circumstances in the record and misread the trial judge's findings regarding mitigating circumstances, and affirm the sentence based on a mischaracterization of the trial judge's findings." *Id.*

The same is true in the present case, where the Supreme Court of Illinois did not address the sentencing judge's comments, but instead relied exclusively on the finding of one mitigating factor and the fact that the government asked the court to evaluate all of the evidence produced at trial. Not considering the trial court's comments in this case is tantamount to not considering the evidence of nonstatutory mitigating circumstances in *Parker*. When viewed in isolation, the State's request that the government consider all of the evidence produced at trial provides adequate

justification for the conclusion that the sentencer accounted for Wright's history. But the sentencing judge went further in this case, listing all of the categories of evidence he would not consider. Accordingly, even accepting that we are presented with a question of historical fact, we believe that the Supreme Court of Illinois' finding "is not fairly supported by the record." *Parker*, 498 U.S. at 320.

We also note that the fact/law distinction in this case is not as pristine as Judge Easterbrook suggests. In *Parker*, the basis for the Supreme Court's holding was that the legality of the defendant's sentence did not necessarily follow from "a resolution of the question of what the trial judge found." *Id.* This factor made the interpretation of the sentencing court's remarks a question of fact. Here, however, the question is whether the sentencing court failed to consider Wright's mitigating evidence, and resolution of that question in the affirmative necessarily means that the sentencing judge violated the constitutional requirements announced in *Eddings*. To say that we cannot evaluate as a matter of law whether the sentencer complied with *Eddings* because the Supreme Court of Illinois decided as a matter of historical fact that the sentencer complied with *Eddings* engages in a circularity not required by *Parker*.

With due deference to the appropriate restraints of federalism and the limited role of this court on habeas review, there can be no question that the law clearly requires a sentencing judge to evaluate the individualized circumstances of each capital defendant prior to imposing the death penalty. Because the sentencing court's statements reflect the wholesale exclusion of evidence offered by Wright in mitigation, we conclude with constitutionally grounded certainty that Wright did not receive the individualized sentence as mandated by *Eddings*.

B. Ineffective Assistance of Counsel

Wright cross-appeals the district court's decision to deny relief for ineffective assistance of trial counsel. Wright argues that trial counsel was ineffective for failing to discover, investigate and introduce 50 pages of medical records describing Wright's mental health history that would have both corroborated his trial testimony and supported a GBMI verdict. According to the district court, the 50 additional pages contained information that Wright had I.Q. test scores of 73 to 81, which classifies him as a person of borderline mental deficiency. The records further discuss Wright's history of taking prescription psychiatric drugs, his testimony regarding his traumatic life before his adoption at age four, and the fact that his adoptive parents abused him. Wright alleges that trial counsel's performance fell below an objective standard of reasonableness because there is no valid strategic reason for failing to investigate and introduce Wright's hospital records. In addition, Wright challenges trial counsel's failure to investigate evidence regarding Wright's alleged organic brain damage. With respect to prejudice, Wright maintains that there is a reasonable probability that a jury would have returned a verdict of guilty but mentally ill had the jury considered evidence beyond Wright's self-serving testimony.

In response, the State argues that this issue is procedurally defaulted. In his first petition for post-conviction relief before the Illinois courts, Wright argued that counsel was ineffective for failing to introduce certain records during the sentencing phase. In a second post-conviction petition before the Illinois courts, Wright challenged trial counsel's decision not to pursue a GBMI verdict, but the Illinois Supreme Court held that he had waived the claim for failing to raise it in his first petition. *Wright III*, 723 N.E.2d at 239. The district court ruled that the procedural default constituted an adequate and independent ground for relief and refused to address counsel's failure to raise a GBMI

defense. Accordingly, the district court limited its ineffectiveness inquiry "to the issue of omitted evidence pertaining to Wright's mental health." *Wright*, 149 F. Supp. 2d at 533.

We assess ineffective assistance of counsel claims under the standards enunciated by the Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). Under *Strickland*, a defendant must establish (1) that counsel's performance fell below an objective standard of reasonableness, and (2) that the deficient performance resulted in prejudice to the defendant. *Id.* at 687. To demonstrate deficient performance, a defendant must show that he has been denied his Sixth Amendment right to a fair trial as the result of the incompetence of defense counsel. *See, e.g., Eddmonds v. Peters*, 93 F.3d 1307, 1313 (7th Cir. 1996). "This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687. In this context, it is not reasonable to judge counsel's performance based on "hindsight." Instead, we evaluate counsel's performance based upon her perspective at the time of trial. *Id.* at 689.

Before reaching the merits of Wright's appeal, we must clarify what ineffective assistance claims survive. In our view, the district court correctly held that trial counsel's failure to urge a GBMI verdict was procedurally defaulted. *See Wright*, 149 F. Supp. 2d at 533. The Illinois Supreme Court held that Wright had failed to raise this issue in his first petition for post-conviction relief and that it was therefore procedurally defaulted. *Wright III*, 723 N.E.2d at 239. This is an adequate and independent state justification, a decision that we must respect even in the pre-AEDPA context of this case. *See Coleman v. Thompson*, 501 U.S. 722, 729 (1991). Accordingly, we will not reach the merits of whether trial counsel was ineffective for failing to raise this issue.

That leaves trial counsel's failure to obtain the 50 pages of additional medical records. Here, we note that this is not a case where trial counsel wholly failed to investigate—or cursorily investigated—the defendant's insanity. *See Brewer v. Aiken*, 935 F.2d 850 (7th Cir. 1991); *Harris v. Dugger*, 874 F.2d 756, 763 (11th Cir. 1989); *Profitt v. Waldron*, 831 F.2d 1245, 1248-49 (5th Cir. 1987). Wright's trial counsel took reasonable steps to identify and locate his mental health records. The record in this case reveals that trial counsel received an "extensive" number of psychiatric documents concerning Wright's mental health, and that trial counsel's access to the documents he did possess enabled him to conduct an extensive cross-examination of the State's psychiatric expert who testified at trial. *See Wright II*, 594 N.E.2d at 280-81. At the time of trial, counsel had received most of Wright's medical records. Because certain state agencies and mental institutions neglected to turn over all of the records does not mean that counsel acted deficiently. An attorney's investigation need not be unlimited in scope or unerring in execution, but merely reasonable. *Rogers v. Israel*, 746 F.2d 1288, 1294 (7th Cir. 1984). We need not decide whether Wright was prejudiced by the failure to obtain the additional records because we hold that counsel's performance did not fall below an objective standard of reasonableness. *Strickland*, 466 U.S. at 697.

III. Conclusion

Because the sentencing judge excluded from consideration mitigating evidence about Wright's traumatic history, we AFFIRM the district court's decision vacating the death penalty. We also AFFIRM the decision to deny relief based upon ineffective assistance of counsel. Trial counsel obtained most of Wright's medical records, and these efforts did not fall below an objective standard of reasonableness.

EASTERBROOK, *Circuit Judge*, dissenting in part. Patrick Wright had a troubled childhood and has led a wretched life. Since the age of 15 Wright has spent most of his days in custody and wreaked mayhem when free. In sentencing Wright to death for home invasion, robbery, sexual assault, and murder, the state judge—acting as trier of fact after Wright waived his right to have his fate determined by a jury—admitted all of the evidence Wright offered in mitigation and observed: "I don't think any reasonable person who has heard all of the evidence in this case can feel anything but sympathy for the pathetic creature, Patrick Wright". But the judge added that he would not allow sympathy to affect his sentence.

Wright entered the Specht home intending to steal what he could and kill anyone who got in his way. He slit Connie Specht's throat, in her mother Carol's presence, after trying but failing to rape both the girl and the woman; he stabbed Carol to death. Connie survived and called the police. Wright confessed; that plus physical evidence and Connie's account leave no doubt of his guilt. The judge found that aggravating circumstances far outweighed any mitigating factors (particularly the judge's conclusion that Wright acted "under the influence of [a shoe fetish, which amounted to] extreme mental or emotional disturbance"). My colleagues hold that by declining to treat Wright's upbringing as an additional factor in mitigation, independent of its effect on his mental state, the judge violated the Constitution. I do not agree with this conclusion. There is a big difference between a legal rule *forbidding* a judge to give mitigating weight to some factor and a legal rule *compelling* a judge to give mitigating weight to that factor. *Eddings v. Oklahoma*, 455 U.S. 104 (1982), and *Lockett v. Ohio*, 438 U.S. 586 (1978), condemn the former but do not require the latter. They hold that "the sentencer in capital cases must be permitted to consider any relevant mitigating factor" (*Eddings*, 455 U.S. at 112); they do not hold that the sen-

tencer must deem any particular factor to be mitigating. Wright's sentence therefore is lawful, and I dissent from the majority's contrary decision—though I join its conclusion that the judgment of conviction is valid.

My colleagues start with the fact that the judge who sentenced Wright said, after summarizing the evidence (and making the comments I have quoted);

> [A]ny matters dealing with sympathy, outrage, who the victim was, all the matters I just mentioned have no bearing on whether the defendant shall receive the death penalty. And again, I note for the record that I have cited them so the record is clear that I have rejected them, and I have disregarded them in making my decision.

Then they compare this with the "strikingly similar" statement held in *Eddings* to demonstrate a violation of the Constitution (slip op. 10):

> Nor can the Court in following the law, in my opinion, consider the fact of this young man's violent background.

The judge in Wright's case "disregarded" his childhood; the judge in Eddings's case declined to "consider" it; these come to the same thing, my colleagues hold. But they are the same thing only if they reflect the same understanding of the judge's discretion—which they do not. The judge in *Eddings* thought that the law forbade him to give weight to the defendant's troubled childhood. This is the import of "[n]or can the Court *in following the law*" give weight to that factor (455 U.S. at 109, emphasis in original). As the Justices remarked: "From this statement it is clear that the trial judge did not evaluate the evidence in mitigation and find it wanting as a matter of fact; rather he found that as a matter of law he was unable even to consider the evidence." *Id.* at 113. *Eddings* added that the state's "Court of Criminal Appeals took the same approach. It found that the

evidence in mitigation was not relevant because it did not tend to provide a legal excuse from criminal responsibility." *Ibid.* That view conflicted with the constitutional principle that a "sentencer [may] not be precluded from considering, as a *mitigating factor*, any aspect of the defendant's character or record . . . that the defendant proffers as a basis for a sentence less than death." *Lockett*, 438 U.S. at 604 (plurality opinion; emphasis in original), quoted with approval in *Eddings*, 455 U.S. at 110.

Lockett and *Eddings* hold that whoever wields the power to impose capital punishment also must have unfettered discretion to dispense mercy. To say that there is discretion is to say that the sentencer may be unmoved—even may treat a wretched childhood as a factor in *aggravation* because it implies that the defendant is inured to violence and thus more likely to be incorrigible. Nothing in *Eddings* (or any other decision) compels the sentencer to give favorable weight to a circumstance proffered in mitigation. *Burger v. Kemp*, 483 U.S. 776 (1987), illustrates this point. Burger accused his lawyer of ineffective assistance for failing to present evidence of his unhappy childhood and abusive family. The Court held that this omission did not violate the Constitution in light of the risk that the sentencer would deem the background damning: evidence showing that a person had a rough past and fell in with a bad crowd often implies future dangerousness. *Id.* at 793-94.

We have elaborated on this in a series of decisions that, like *Burger*, the majority disregards. *Stewart v. Gramley*, 74 F.3d 132 (7th Cir. 1996), is the most thorough and worth an extended quotation:

> We are mindful of [the argument] that *anything* which serves to amplify the personal history of the defendant and by doing so furnishes clues to the causality of the crime for which he has been sentenced to death makes such a sentence less likely to

be imposed. Causality is mitigation, the lawyer argued. *Tout comprendre c'est tout pardonner.* It is not an absurd argument. It exploits the tension between belief in determinism and belief in free will. If the defendant's crime can be seen as the effect of a chain of causes for which the defendant cannot be thought responsible—his genes, his upbringing, his character as shaped by both, accidents of circumstance, and so forth—then a judge or jury is less likely to think it appropriate that he should receive a punishment designed to express society's condemnation of an evil person. We consider a rattlesnake dangerous but not evil. Maybe if we learned enough about Walter Stewart we would consider him a person who had no more control over his actions than a rattlesnake has over its actions.

But not everyone who believes that human actions are as much the consequences of causal factors as anything else in nature denies that man is "free" to refrain from "voluntary" acts such as murder and is therefore blameworthy if he does not. "Compatibilists" since Hume have argued that human action is both caused and, for purposes of ascribing moral and legal responsibility, free. We cannot resolve a philosophical debate. And need not. It is enough for our purposes that capital punishment is not premised on—indeed is inconsistent with—the view that the only reason we think that people act "voluntarily" is that we have not studied the antecedents of their actions carefully, and that the purpose of a death-penalty hearing is to investigate the defendant's history in sufficient depth to dispel the illusion that he was free not to commit the crimes for which he is being condemned. For then the sentence of death would be the proof that the lawyers had not done their job. And since it obviously is not the

theory of capital punishment that murderers are compelled to murder by their past and therefore should not be punished, it cannot be right that anything brought out at a death-penalty hearing is certain or even likely to help the defendant to save his life. What is brought out that will help him is what goes to show that he is not as "bad" a person as one might have thought from the evidence in the guilt phase of the proceeding. What is brought out that will hurt him is what goes to show that he is, indeed, as bad a person, or worse, than one might have thought from just the evidence concerning the crime.

At the sentencing hearing members of Stewart's family and his former supervisor at work testified that he had been abandoned by his mother when he was an infant (he does not know who his father was) and had been brought up by his grandparents in Michigan. His grandmother died when he was 15. He had moved to Chicago with his grandfather a few years earlier. He was friendly, worked some and got along with his coworkers, and attended church regularly. Ten years after moving to Chicago he held up the jewelry store. Shortly before that his grandfather had died and Stewart had been distraught. In the closing argument at the sentencing hearing his lawyer did not mention Stewart's personal history although he had brought it out at the hearing through the testimony that we have just summarized.

The fruits of the investigation by Stewart's current lawyers are summarized in a report by a "mitigation specialist" backed up by affidavits. According to the report Stewart was born at home without the assistance of a doctor and fell on the floor on his head when he emerged from his mother's body. His

mother was 19 years old and gave Stewart to her parents when he was six months old. She does not know the name of his father. She eventually moved in with her parents, so that she was living in the same house with Stewart, but she did not treat him as her son and displayed no affection for him. When Stewart was 12 his grandfather, whom he doted on, had a mental breakdown. Stewart was a hyperactive child, did badly in school, and dropped out after the ninth grade. Coming from rural Michigan Stewart was not used to the guntoting ways of his Chicago age-mates and imitated their behavior, which included carrying and using guns. At age 13 he fell under the influence of his cousin Geraldine, "a hustler who got her money through swindling people." Fagan-like, Geraldine used Stewart "as her apprentice and bodyguard." The affidavit of one of Stewart's sisters states that "Geraldine is the rotten egg of the family."

Stewart "was enthralled by Geraldine's lifestyle," and "turned increasingly to crime, primarily robberies." He began using drugs, and for a time was a heroin addict. Once, while under the influence of heroin (which, the "mitigation specialist" pointed out, can injure the brain), Stewart "beat Wanza [another one of his sisters] very badly and the police had to be called."

Much of this narrative is irrelevant, such as the circumstances of Stewart's birth, the fact that his grandfather had a mental breakdown, and the heroin addiction. The purpose of these details is to insinuate that Stewart may have brain damage, but of this there is absolutely no evidence . . . . As for his falling among evil companions, it is obvious that one does not become a teenage robber without being initiated into criminal activity by older hands, not

> uncommonly a relative. As for drug abuse, the report does not suggest and there is no evidence that Stewart committed the robbery and murders while under the influence of any drug, or, as we have already noted, that he has any organic brain damage. That he comes from a broken home and was brought up in a poor, rough neighborhood of Chicago was known at the sentencing hearing .... The report of the mitigation specialist adds colorful details possibly relevant under a *tout comprendre* defense if one existed, but not calculated to make a judge or jury think Stewart less deserving of the death penalty.
>
> The mitigation specialist's reference to Stewart's having embarked on a criminal career consisting "primarily of robberies" after he met cousin Geraldine when he was 13 is highly relevant to appraising the likely impact of current counsel's thorough investigation on a sentencing judge. The criminal record that was put before the judge understated, we now know as a result of the investigation, Stewart's actual criminal history. Evidently the nine crimes of which he had been convicted (or sentenced to supervision) were only the tip of the iceberg. He had been a career criminal from the age of 13. This was, it appears, when he began to "use guns." The implication is that when he started on the robbery trail he used guns in his robberies, and recall that one of his convictions was for armed robbery—committed when he was only 14. The murders in the jewelry store were the predictable culmination of his criminal career. He was by then a hardened, dangerous, and seemingly inveterate criminal.

74 F.3d at 136-37. Recently we have made the same point succinctly:

> All that Britz's meticulously researched personal history shows, as in the other cases we have cited, is that he led a disordered life culminating in the murder for which he has been sentenced to death. People with his background of antisocial behavior are more likely to commit murders than other people, but this does not make them attractive candidates for lenity; rather, it underscores their dangerousness.

Britz v. Cowan, 192 F.3d 1101, 1104 (7th Cir. 1999). A judge who shared this perspective would have admitted the evidence of Wright's background, expressed compassion for him as a victim of others' wrongs, given mitigating weight to any mental limitations caused by whatever abuse he had endured, and finally declared the offender's background otherwise not a reason to reduce his punishment. That is exactly what this sentencing judge *did* do! So where is the constitutional flaw? Is it that a state judge is forbidden to go straight to the bottom line, without articulating the intermediate steps laid out in *Stewart*? Or perhaps there is a need for magic words, as the majority implies in stating that a judge must declare something like "I have taken X into account but given it no weight"? Why there is a constitutional difference between "I have rejected X" (which this judge said) and "I have given X no weight," my colleagues do not explain. Anyway, an obligation to state affirmatively that some circumstance has been "taken into account" cannot be found in *Eddings* (the majority cites no source at all for this directive, which appears at slip op. 9 n.4), and as a new rule it may not be applied in a collateral attack. See *Teague v. Lane*, 489 U.S. 288 (1989). My colleagues must think their approach a logical extension of *Eddings*, but *Teague* puts extensions (logical and otherwise) off limits.

Let us return, then, to the rule stated by the Supreme Court in *Eddings*: that no state may *forbid* a capital sen-

tencer to consider any ground advanced in mitigation. Because the judge's explanation was curt, it is impossible to exclude the possibility that he sought to convey the same message as the judge in *Eddings*. Yet if this is what he meant, his expression was inept; the key phrase from *Eddings* ("[n]or can the Court *in following the law* . . . consider" certain evidence) is missing and not replaced by an equivalent. One would expect a judge to be able to announce a conclusion that the law (as he understood it) disabled him from taking some factor into account. Yet Illinois law was (and is) clear that a troubled youth may be considered in mitigation, see *People v. Lewis*, 88 Ill. 2d 129, 144, 430 N.E.2d 1346, 1352 (1981), so it is not surprising that the judge did not mention any legal prohibition. To read this judge's brief oral statements as foreclosing on legal grounds all possibility that a person's childhood could mitigate his punishment is to accuse him of failing to know and follow state law—which not only would be inappropriate (a presumption of irregularity?) but also is not the reading given to the judge's remarks by the Supreme Court of Illinois, which found no violation of the state's consider-everything norm. *People v. Wright*, 111 Ill. 2d 128, 166-68, 490 N.E.2d 640, 656 (1985). (The state's highest court considered and sustained the conviction and sentence twice more on collateral review. See *People v. Wright*, 149 Ill. 2d 36, 594 N.E.2d 276 (1992); *People v. Wright*, 189 Ill. 2d 1, 723 N.E.2d 230 (1999). Wright did not renew in either of those proceedings any contest to the interpretation given in 1985 to the sentencing judge's remarks.)

The most one can say is that the statements were ambiguous—as oral expressions so often are—because they did not explicitly draw a distinction between legal rules and case-specific application. Did the judge mean that Wright's childhood *may not* be considered (a legal error) or only that Wright's childhood *will not* be considered (a factual conclusion that the evidence did not justify mercy)? The meaning

of an ambiguous pronouncement is a question of fact, not of law. *Parker v. Dugger*, 498 U.S. 308, 320 (1991); *Wainwright v. Goode*, 464 U.S. 78, 83-85 (1983); *Rivera v. Sheriff of Cook County*, 162 F.3d 486 (7th Cir. 1998). Because meaning is a fact, the state appellate court's resolution controls unless not fairly supported by the record. This principle—a holding of *Parker*, *Goode*, and *Rivera* alike—governs pre-AEDPA cases under the old 28 U.S.C. (1994 ed.) §2254(d)(8) and newer cases under the current §2254(e)(1). The majority's opinion seems to rest on the view that, because the state judge's words are in black and white on paper, we can decide their meaning as readily as the state's highest court. The view that findings based on documents may be freely reviewed by appellate tribunals was ringingly rejected in *Anderson v. Bessemer City*, 470 U.S. 564, 573-75 (1985), with respect to the relations between trial and appellate judges in a unitary judicial system; it is even less persuasive when applied to relations between the state judicial system and the federal.

Reading the sentencing judge's statement as a finding that he was not swayed by Wright's background, as opposed to a declaration that he was legally forbidden to consider it, is fairly supported by the record; it is, indeed, the most natural reading. The judge did not imply that he thought himself blocked by a rule of law from dispensing mercy that he deemed warranted. Unless the sentencing judge thought the law an obstacle to acting on mitigating evidence, there is no problem under *Eddings*. Because the judge did not declare that the law stopped him from reducing Wright's sentence, the Supreme Court of Illinois' resolution of the ambiguity is supported by the record, and thus conclusive in this collateral attack. My colleagues say in response that the court's "holding [does] not withstand scrutiny" (slip op. 8). To call the Supreme Court of Illinois' conclusion a "holding" is to call it a proposition of law, which in pre-AEDPA cases we review without deference. It is *not* a "holding,"

however; it is a finding of fact. The state judge gave thought to (and believed himself legally entitled to reduce a sentence because of) Wright's childhood, or he did not; the Supreme Court of Illinois concluded that he had done so (this is the point of its statement that the judge "considered all potential mitigating facts in the record", 111 Ill. 2d at 168, 490 N.E.2d at 656).

Characterizations of what happened *are* facts, even when they are entangled with legal issues and determine the outcome of the litigation. See, e.g., *Pullman-Standard v. Swint*, 456 U.S. 273, 288 (1982) (whether particular conduct is "discrimination" is a question of fact); *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709 (1986) (whether a worker is a "seaman" is a question of fact). See also *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 399-405 (1990) (characterizations under fact-dependent legal standards, such as whether a suit is frivolous, are treated as facts and thus subject to deferential appellate review). What the state judge thought about the extent of his discretion is a proposition about the state of the world, not about the state of the law. That's the point of Baron Bramwell's famous observation that "[t]he state of a man's mind is just as much a fact as the state of his digestion." *Edgington v. Fitzmaurice*, 29 Ch. Div. 459, 483 (1885). The Supreme Court of Illinois told us what we need to know about the state of the sentencing judge's mind. See also *Banks v. Hanks*, 41 F.3d 1197 (7th Cir. 1994).

Wright tries to get mileage from the context of the sentencing judge's declaration: "any matters dealing with sympathy, outrage, who the victim was, all the matters I just mentioned have no bearing on whether the defendant shall receive the death penalty." To lump "sympathy" with "outrage" is to imply that the same rule applies to both, and as "outrage" should not be considered, the sentencing judge must have thought that "sympathy" should not be considered either. That is another possible reading—one my col-

leagues embrace, slip op. 11-12—but not one that the state courts were compelled to adopt. The statement "X, Y, and Z have no bearing on whether Wright shall be sentenced to death" *could* mean "X, Y, and Z have no bearing on whether Wright shall be sentenced to death, for one legal reason applicable to all three grounds." Or it could mean "X, Y, and Z have no bearing on whether Wright shall be sentenced to death, because none of them makes any difference to me as a matter of fact." The Supreme Court of Illinois could complete the sentence either way—and it chose the latter way, with considerable logical support, for reasons I have covered. My colleagues demand "constitutionally grounded *certainty* that Wright [received] the individualized sentence . . . mandated by *Eddings*" (slip op. 14, emphasis added), but no rule of law calls for "certainty". Such a demand contradicts *Parker* and *Goode* (a state court's findings of fact matter only when there is *un*-certainty!) and transgresses *Teague* as well (the majority does not cite any pre-1985 case, indeed any case at all, for its insistence on "certainty"). The idea that a record's silence on some important matter, and consequent lack of "certainty," requires a federal court to annul a state court's judgment finds no support in the Supreme Court's cases, and many hold the contrary—most recently, *Mickens v. Taylor*, 122 S. Ct. 1237 (2002) (silence about the effect of counsel's conflict of interest, as a result of judge's failure to inquire, does not lead to relief even in a capital case).

Giving an ambiguous statement a meaning that renders it unconstitutional (and a violation of state law to boot) disrespects the state judge's legal skills and denigrates the role of the state judiciary in resolving disputed issues of fact. My colleagues treat a state judge imposing sentence as if he were an administrative law judge in a Social Security disability case, obliged to use prescribed verbal formulas and required to tie up all loose ends on pain of remand, and they disdain the decision of the state's highest

court. That is not the right relation between the state and federal judiciaries. A state judge is not an ALJ, and it is a state's appellate judiciary rather than a federal court on collateral review that untangles ambiguities attending oral expositions. Nor is an insistence that only "certainty" suffices the right relation between a court of appeals and the Supreme Court of the United States.

Finality and expedition are important in every criminal case. The meaning of this statement was resolved in 1985. Words offer only a cloudy window into the sentencing judge's thoughts, so reasonable people could disagree about their import; the Justices of the Supreme Court of Illinois *did* disagree in 1985, dividing five to two about this subject. Seventeen years later two federal appellate judges sign on with the dissenters. That delay does more to show the wisdom of the rule treating these matters as factual (which allows the state's decision to stand) than to justify throwing the state-court decision out the window and treating the issue as *res nova*. If matters had been resolved differently in 1985, all doubt could have been resolved, likely just by asking the sentencing judge what he had meant by his statements. Now it is too late—and delay is a powerful reason to treat this subject as one of fact, in order to bring disputes such as this to timely closure.

No resentencing 20 years after the fact can be as good as the one now upset: human memory fades, so the accuracy of sentencing degrades. New errors are bound to occur, mistakes that likely will be more substantial than the ambiguity that concerns my colleagues. Yet no substantial federal question compels a new proceeding. *Lockett* and *Eddings* settle the major legal question; only implementation remains. Nonetheless, by holding that both the passage of time and the findings of the state's highest court are irrelevant, my colleagues *create* legal problems concerning federalism, the vitality of the rule stated by *Parker* and *Goode*,

the novel demand for "certainty" in adjudication, and the application of *Teague* to the majority's innovations.

To treat an ambiguity in two off-the-cuff sentences as spoiling a sentence reviewed and sustained three times by a state's highest court—while giving the findings of that court no respect—is to abuse the power conferred by 28 U.S.C. §2254. Wright is now 59 years old; he will die of old age before we permit the State of Illinois to carry out its judgment.

A true Copy:

Teste:

_____

Clerk of the United States Court of Appeals for the Seventh Circuit

[Dated June 11, 2001]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

PATRICK H. WRIGHT,	)	
	)	
Plaintiff,	)	
v.	)	No. 93-2105
	)	
	)	
ROGER COWAN, Warden of Menard Correctional Center,	)	
	)	
	)	
Defendant.	)	

ORDER

Patrick H. Wright filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254 on May 26, 1993. The matter was stayed pending resolution of state court matters, but is now ready for a ruling. For the following reasons, the court denies the petition for a writ of habeas corpus with respect to the guilt-innocence phase of the trial, but grants the writ with respect to the death sentence subject to the conditions discussed below.

BACKGROUND

Wright was charged with murder, attempted murder, attempted rape, armed robbery, home invasion, and residential burglary. The state alleged that Wright broke into the home of Carol Specht and her daughter, Connie, and attempted to rape them both. He then stabbed Carol Specht in the back, and slashed Connie Specht's throat. Connie survived, but her mother did not. In support of those allegations, the state offered Wright's taped confession, the

testimony of Connie Specht, and corroborating physical evidence.

Wright did not contest the state's version of events at trial, but asserted that he suffered from a serious mental illness amounting to insanity. The sole evidence offered in support of that defense was Wright's own testimony. He testified about abuse his natural parents inflicted upon him before his adoption at age four. He discussed his fetish for women's shoes, and stated that he believed it constituted a mental disease or defect. Since the age of seven, he had used women's shoes for sexual gratification, causing his adoptive mother to beat him out of frustration. When he was thirteen, Wright began a fifteen-year period of institutionalization at various mental hospitals. He testified that his shoe fetish was the reason for the institutionalization, and that he believed he had never been cured. He explained that he served time in jail intermittently between 1973 and 1982 for crimes such as theft and burglary, which he committed in an effort to gratify his desire for women's shoes.

Wright testified that he committed the crimes at issue after entering the victims' apartment to look for shoes. Once inside, he had "this out-of-mind situation", which led to the death of Carol Specht and the attempted murder of her daughter. He stated that he was simply unable to control his conduct while in the apartment. In rebuttal, the state offered the testimony of a psychiatrist, Dr. Gerald Fowler, who said that Wright was not insane or mentally ill. He classified Wright's disorder as a non-pathological psychosexual disorder. Dr. Fowler believed that at the time he entered the Spechts' apartment, Wright was able to appreciate the criminality of his conduct and to conform to the law's requirements.

On September 19, 1983, Wright was convicted in the Circuit Court of Coles County, Illinois of murder, attempted

murder, attempted rape, armed robbery, home invasion, and residential burglary. He waived a jury for sentencing, and the trial court sentenced him to death. It concluded that he was under extreme mental stress at the time of the crimes as "the result of the personality disorder he suffered, his women's shoe fetish." Nevertheless, the court noted that defense counsel "did not point out any other mitigating factors that the court should consider at this point," and refused to consider any sympathy engendered by Wright's pitiful life story. The court found that the crime was premeditated, and that the victims were defenseless. The court also found it significant that Wright was capable of trying to dispose of evidence within an hour of the crime.

Wright appealed directly to the Illinois Supreme Court, and raised the following issues: (1) probable cause did not support his warrantless arrest; (2) the trial court erred when it prevented defense counsel from cross-examining the surviving victim as to Wright's sanity at the time of the offense; (3) the state deprived Wright of the right to a fair trial when it failed to comply with discovery rules; (4) Illinois' death penalty statute is unconstitutional; and (5) the trial court erred when it refused to consider its sympathy for Wright as a mitigating factor. The court affirmed his conviction and sentence on October 19, 1985. *People v. Wright,* 490 N.E.2d 640 (1985) ("*Wright I*"). The United States Supreme Court denied certiorari the following year. *Wright v. Illinois,* 479 U.S. 1101 (1987).

Wright filed a petition for post-conviction relief on August 18, 1987. That petition was denied without an evidentiary hearing on January 19, 1990. On appeal to the Illinois Supreme Court, Wright raised the following issues: (1) trial counsel was ineffective for failing to discover additional records of petitioner's mental health treatment; (2) the trial court erred when it refused to appoint a third psychiatric expert on post-conviction proceedings; and (3) the trial

court's improper reliance on residential burglary to justify in part its decision to impose the death penalty warranted a new sentencing hearing. The court affirmed the trial court's dismissal of the petition on June 25, 1992. *People v. Wright,* 594 N.E.2d 276 (1992) (*"Wright II"*). The United States Supreme Court denied certiorari the following year. *Wright v. Illinois,* 506 U.S. 1004 (1992).

On May 26, 1993, Wright filed a petition for writ of habeas corpus. The court appointed counsel. On July 13, 1993, the respondent filed an answer. Shortly thereafter, on September 1, 1993, Wright moved for summary judgment. Later that month, however, he filed a second amended post-conviction petition in state court. He then moved to stay the proceedings in this court pending exhaustion of state court remedies. The court granted the stay.

The trial court eventually dismissed Wright's second amended petition, and he once again appealed to the Illinois Supreme Court. He alleged the following claims: (1) the trial judge had presided under a conflict of interest because he had previously prosecuted Wright for the armed violence conviction, which the state used as impeachment at trial and in aggravation at sentencing; (2) trial counsel was ineffective for not raising the issue of the judge's conflict, and appellate counsel was ineffective for not raising trial counsel's ineffectiveness on appeal; (3) the prosecutor had a conflict of interest because she served as Wright's attorney on the previous armed violence case; (4) trial counsel was ineffective for failing to investigate, argue, and introduce available evidence that Wright should be found guilty but mentally ill ("GBMI"); and (5) trial counsel was ineffective for failing to investigate and introduce available mitigating evidence of Wright's mental deficiency and psychological problems. On November 18, 1999, the court affirmed the trial court's dismissal of the petition. *People v. Wright,* 723 N.E.2d 230 (1999) (*Wright III*). The United

States Supreme Court then denied certiorari. *Wright v. Illinois,* 121 S.Ct. 94 (2000).

ANALYSIS

In his original petition, Wright alleged ten claims. He has since withdrawn three of them. Accordingly, only the following seven claims remain:

> 1) Wright was deprived of effective assistance of counsel at trial because counsel failed to argue, investigate, and introduce available evidence about Wright's mental health;
>
> 2) His rights under both the Fourteenth and Eighth Amendments were violated because the trial judge believed that the law precluded him from considering Wright's traumatic childhood and lifelong history of mental problems as mitigating evidence in imposing a sentence;
>
> 3) Wright was deprived of his right to due process of law because the trial court considered and relied on evidence from outside the record of other murder cases in sentencing Wright to death;
>
> 4) The Illinois Supreme Court, after finding that the trial court used an improper aggravating factor, erred by failing to re-weigh independently the aggravating and mitigating facts, remand the case, or engage in harmless error analysis;
>
> 5) The trial judge who presided over Wright's trial and sentenced him to death had a conflict of interest arising from his role as the prosecutor in Wright's 1979 armed violence conviction, which was relied upon by the judge as an aggravating factor;
>
> 6) Wright was deprived of his right to due process of law because the prosecutor in this case had rep-

resented Wright in the 1979 armed violence charge; and

7) The Illinois Death Penalty Statute is unconstitutional.

Wright filed his petition for a writ of habeas corpus before April 24, 1996, the effective date of the Antiterrorism and Effective Death Penalty Act ("AEDPA"). Because the AEDPA's amendments to the habeas corpus statute do not apply, the court will analyze Wright's claim under the prior law. *See Lindh v. Murphy,* 521 U.S. 320 (1997); *Abrams v. Barnett,* 121 F.3d 1036, 1037 (7th Cir.1997). Before the AEDPA, federal courts deferred to a state court's findings of fact, but disregarded its legal conclusions and reached independent judgments on constitutional issues. *Koo v. McBride,* 124 F.3d 869, 872 (7th Cir.1997). The pre-AEDPA scheme also permitted reliance on other courts' jurisprudence in addition to Supreme Court case law in determining whether a conviction was contrary to clearly established federal law. *Abrams,* 121 F.3d at 1037.

Before considering the merits of a habeas petition, however, a federal court must ensure that the petitioner has overcome two procedural hurdles: exhaustion and procedural default. *Henderson v. Thieret,* 859 F.2d 492, 496 (7th Cir.1988), *cert. denied,* 490 U.S. 1009 (1989). Failure to exhaust all state remedies bars consideration of the petition. Likewise, failure to raise all claims during the course of state court proceedings bars consideration of those claims not raised. *Henderson,* 859 F.2d at 496. Furthermore, federal courts may not review a state court's denial of a state prisoner's federal constitutional claim if the decision rests on an independent and adequate state ground. *Coleman v. Thompson,* 501 U.S. 722, 729 (1991). That doctrine "applies to bar federal habeas when a state court declined to address a prisoner's federal claims because the prisoner had failed to meet a state procedural requirement." *Coleman,* 501 U.S.

at 729-30. Where a state court has plainly stated that a procedural bar prevents it from deciding the issue on appeal, federal courts may not review the merits of the issue. *Harris v. Reed,* 489 U.S. 255, 266 (1989).

The respondent argues that all of Wright's claims lack merit, and that the first, fifth, and sixth claims are procedurally defaulted because Wright failed to present them adequately to the state courts. With the aforementioned principles in mind, the court now turns to Wright's claims for relief.

Claim 1: Trial counsel was ineffective for failing to argue, investigate, and introduce available evidence about Wright's mental health

Wright argues that defense counsel, Brian Silverman, was ineffective for failing to argue, investigate, and introduce available evidence that Wright should be found GBMI. Specifically, he claims that Silverman should have discovered approximately fifty pages of medical records from Wright's stays at various mental institutions. He also alleges that Silverman was ineffective for failing to offer in the guilt-innocence phase of the trial the testimony of a psychiatrist to establish that Wright was mentally ill.

In support of this claim, Wright offers Silverman's deposition testimony. Silverman testified that he considered Wright's mental state to be the most important issue in the case. In preparation for trial, he investigated evidence to support a claim of insanity, or at least a verdict of GBMI. He requested discovery and that a psychiatrist be appointed to examine Wright.

Although Silverman sought Wright's medical records, he did not get all of them; he never received about fifty pages of records. At the time, he did not know that these missing records existed. He blames this deficiency on the Illinois

Department of Mental Health and Developmental Disabilities, which he explained was "not a very competent agency." Silverman never, however, attempted to subpoena records from individual hospitals. The overlooked records indicate that Wright had I.Q. test scores of eighty-one and seventy-three, which classifies him as a person of borderline mental deficiency and mild impairment. The records further note Wright's history of taking prescription psychiatric drugs, and corroborate Wright's testimony about his traumatic life before his adoption at age four. The records also corroborate Wright's allegation that his adoptive parents abused him as well. This abuse contributed not only to his shoe fetish, but also to a nervous condition causing continuous trembles throughout his body, difficulty accepting a masculine role, low frustration and tolerance level, childlike and schizophrenic thinking, and the capability to function only in a highly structured setting.

Silverman also failed to consider whether Wright suffered from organic brain damage. He did not know that testing for organic brain damage existed at the time of trial. Nor did he offer during the guilt-innocence phase of the trial the testimony of Dr. Arthur Traugott, who at sentencing opined that Wright was mentally ill, although not legally insane. He explained that the shoe fetish controlled Wright's lifestyle and led to his institutionalization and incarceration. He testified that the crimes at issue were the result of Wright's anger and frustration as opposed to any pre-planning. He testified that although the shoe fetish caused Wright to break into the Spechts' apartment and would always be with him, the fetish did not cause him to commit the acts of violence against the victims. Instead, Dr. Traugott believed that Wright failed to think straight when frustrated.

In his deposition, Silverman stated that he chose to focus Wright's entire case on an insanity defense, to the exclusion of a GBMI verdict. He considered a GBMI verdict to be

a "fraud" and a "sham." He analogized his all-or-nothing strategy as aiming for an A rather than a B on a test. He therefore chose not to call Dr. Traugott because he was afraid the state would be able to elicit on cross-examination his opinion that, although Wright was mentally ill, he was not insane. Silverman offered no expert to testify that Wright was insane; he instead relied on both Wright's testimony that he had an "out-of-body experience" and his ability to cross-examine the state's expert witnesses. Silverman conceded, however, that Wright's testimony went poorly.

At the penalty phase, Silverman's strategy was to convince the judge that Wright was emotionally disturbed, albeit not so disturbed that he had a defense to the crimes. Silverman believed that the trial judge would not impose the death penalty if he found Wright to be emotionally disturbed. And even if he did sentence Wright to death, Silverman reasoned, the reviewing court would not uphold the sentence in light of Wright's emotional disturbance. In his deposition, he stated that the additional medical records probably would not have been particularly helpful. He testified that the additional evidence would have been merely cumulative, and introducing cumulative evidence might have annoyed the jury.

Wright also provides an affidavit from psychologist Dr. Michael Gelbart, who conducted neuropsychological testing on Wright. He found that Wright exhibits neuropsychological dysfunction in the areas of sensory perception, motor skills, memory, learning, and problem solving. Deficits in these areas render Wright slow to acquire and encode new information, and unable to account for much of the information available to him. These deficits limit his learning ability, impair his ability to reason and act appropriately under stress. Moreover, they make him more inclined toward disinhibition and impulsivity. These neurocognitive deficits are in addition to and exacerbate his psychiatric

problems. Dr. Gelbart stated that Wright's neurological dysfunction suggests organic brain damage in the temporal and frontal lobe areas of the brain, and that this condition has probably afflicted him for some time. Further, he stated, the extent of Wright's dysfunction and his history of mental illness indicates organic personality syndrome, which involves persistent personality disturbances.

Wright argues that Silverman was ineffective for failing to uncover and offer the foregoing evidence. Silverman testified that from the very start of the case, he knew that Wright's mental state was the most important issue. In fact, he did not believe there were any other legitimate issues once a pretrial motion to suppress was denied. He did not get the medical records at issue, however, because he did not know they existed. Nor did he have Wright tested for neurocognitive defects, which would have helped develop his argument that Wright's mental state diminished his culpability.

Moreover, Wright asserts, Silverman was ineffective for failing to call Dr. Traugott as a witness during the guilt-innocence phase of the trial. Wright argues that counsel based his decision to offer Dr. Traugott's opinions only at sentencing on a fundamental misunderstanding of the law concerning the GBMI verdict. Furthermore, he claims, Silverman could have called Dr. Traugott to testify that Wright was mentally ill without subjecting him to cross-examination as to Wright's sanity. According to Wright, Dr. Traugott's opinion about Wright's sanity would have been outside the scope of direct examination, and therefore the state would have been barred from eliciting this opinion.

Wright argues that none of Silverman's errors was the result of reasonable trial strategy. Moreover, he claims, there is a reasonable probability that he would have been found GBMI but for Silverman's deficient performance. Silverman chose to present a case for GBMI and insanity

based solely on Wright's self-serving testimony. The jury was consequently forced to choose between Wright's testimony and the expert testimony of the state's expert witness. Had the jury heard Dr. Traugott's opinion that Wright was mentally ill, and had it known about Wright's low I.Q., his history of being prescribed psychiatric medication, and the further effects of his traumatic childhood, it might have returned a GBMI verdict. This evidence would have significantly corroborated Wright's testimony and defense. At the very least, the court might have imposed a different sentence had counsel presented the additional mitigating evidence.

The respondent asserts that Wright has procedurally defaulted his claim of ineffective assistance of counsel. He argues that although Wright alleged in his first post-conviction petition that counsel was ineffective for failing to introduce certain records at sentencing, he did not allege this claim as to the guilt-innocence phase. Wright eventually challenged in his second post-conviction petition his attorney's failure to introduce evidence in support of a GBMI verdict, but the Illinois Supreme Court held that he had waived the claim by failing to raise it in his first petition. *Wright III,* 723 N.E.2d at 239. And even though the court in *Wright II* remarked that the additional records might have impacted the GBMI defense, that comment does not establish that Wright actually raised the claim himself. A review of Wright's brief on that appeal, he notes, demonstrates that the only reference to a trial error is a vague statement that Wright was denied a "fair trial." Thus, he argues, the court's finding of waiver in *Wright III* was not error.

In any event, the respondent points out, the Illinois Supreme Court found that counsel conducted an investigation and did everything necessary to get the mental health reports at issue. The court further found that no prejudice

resulted from the omission of these records from the trial court proceedings. The fifty pages of mental health records at issue were often repetitive and largely duplicative of evidence already before the court. Moreover, Silverman received an extensive number of psychiatric documents from the prosecutors. Dr. Traugott, the psychiatrist who examined Wright, then contacted the Department of Health and requested all documents in its possession concerning Wright. Thus, at the time of trial, Silverman reasonably believed that he had received all relevant information and records from the Department, making further investigation unnecessary. To find that counsel was ineffective for failing to get the other fifty pages of records would be to hold him to an unreasonably high standard.

Moreover, the respondent argues, the additional evidence would not have made a difference. The trial judge and jury knew about Wright's history of institutionalization. The additional reports do not establish that he was insane. In fact, one remarked that the label "mentally ill" was little more than an excuse by Wright to avoid taking responsibility for his actions. And although a few of the reports referred to schizophrenia, Dr. Traugott testified in his deposition that the label did not apply to Wright; what is more, the reports did not indicate that the person making the reference was qualified to diagnose Wright.

As discussed above, this court may not review the state court's denial of Wright's federal constitutional claim if the decision of the state court rests on an independent and adequate state ground. *Coleman,* 501 U.S. at 729. That doctrine bars federal habeas relief when a state court declined to address a prisoner's federal claims because he had failed to meet a state procedural requirement. *Coleman,* 501 U.S. at 729-30. Thus, if the Illinois Supreme Court declined to rule on the ineffective assistance of counsel claim because Wright failed to present it properly, this

court may not review the merits of the issue. *Harris,* 489 U.S. at 266.

The court has reviewed the parties' briefs on appeal from the denial of both the first and second post-conviction petitions. Those briefs reveal that Wright did raise in the first petition the issue of counsel's failure to discover and introduce the additional mental health information. The respondent argues that Wright limited this claim to the sentencing phase, and did not discuss the potential effect his failure to introduce the additional evidence had at the guilt-innocence phase. But even a cursory reading of Wright's brief on appeal from the first petition demonstrates that he argued vigorously that trial counsel's ineffectiveness tainted both phases.[1] He therefore presented this issue fairly to the state courts, and is entitled to a review on the merits.

In that first petition, however, he did not claim that counsel was ineffective for failing to focus specifically on getting a verdict of GBMI as opposed to not guilty by reason of insanity. For that reason, the Illinois Supreme Court found that it was waived when he raised it in the second petition. Based on this court's review of the briefs and the state court decisions, it finds that the state court's refusal to consider the issue on the merits was based on an independent and adequate state ground. Wright is therefore not entitled to substantive review on this particular claim.

Accordingly, the court limits its inquiry to the issue of omitted evidence pertaining to Wright's mental health, as

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[1] On page 28 of Wright's brief on appeal from the denial of the first post-conviction petition, he sets forth an argument under the heading "The failure to present the evidence contained in these reports also severely undermines confidence in the outcome of the trial."

opposed to the wisdom of counsel's strategy to pursue exclusively an insanity defense. There is a "strong presumption that counsel rendered reasonably effective assistance," *United States v. Limehouse,* 950 F.2d 501, 503 (7th Cir. 1991) (*citing Strickland v. Washington,* 466 U.S. 668, 689 (1984)), and that the challenged conduct "might be considered a sound trial strategy." *Strickland,* 466 U.S. at 689. To establish prejudice under *Strickland,* a defendant must satisfy a similarly high threshold. "[A] criminal defendant alleging prejudice must show 'that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.'" *Lockhart v. Fretwell,* 506 U.S. 364, 369 (1993) (*quoting Strickland,* 466 U.S. at 687); *see also Eddmonds v. Peters,* 93 F.3d 1307, 1313 (7th Cir.1996) (noting that "[p]rejudice in the *Strickland* sense refers to 'unprofessional errors' so egregious 'that the trial was rendered unfair and the verdict rendered suspect.'") (*quoting Kimmelman v. Morrison,* 477 U.S. 365, 374 (1986)). As applied to sentencing in a death penalty case, prejudice requires a showing "that a reasonable probability exists that, but for counsel's substandard performance, the sentencer 'would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.'" *Hall v. Washington,* 106 F.3d 742, 749 (7th Cir.1997) (*quoting Strickland,* 466 U.S. at 695). Failure to satisfy either the performance or the prejudice prong of the *Strickland* test is fatal to a defendant's ineffectiveness claim. *See Velarde v. United States,* 972 F.2d 826, 828 (7th Cir.1992).

Where an attorney fails to introduce evidence because he was unaware of its existence, the omission cannot be deemed the result of trial strategy. *See Cunningham v. Zant,* 928 F.2d 1006, 1016-18 (11th Cir.1991); *Harris v. Dugger,* 874 F.2d 756, 763 (11th Cir.1989); *People v. Perez,* 592 N.E.2d 984, 994 (Ill. 1992). In some cases, an attorney who does not introduce mental health records because he never investigated that evidence fails to satisfy prevailing

professional norms. *See Williams v. Taylor,* 529 U.S. 362 (2000) (holding that trial counsel's failure to obtain and introduce juvenile and social service records constituted ineffective assistance of counsel, notwithstanding the fact that portions of the records at issue contained information harmful to the defendant's argument); *see also Brewer v. Aiken,* 935 F.2d 850, 857-58 (7th Cir.1991); *Middleton v. Dugger,* 849 F.2d 491, 493-94 (11th Cir.1988); *Profitt v. Waldron,* 831 F.2d 1245, 1248 (5th Cir.1987). Resolution of this claim will depend on the nature and extent of the information available to counsel but not introduced into evidence, as well as the strength of the aggravating evidence presented by the prosecution. In addition, deference must be accorded to strategic decisions made by counsel after suitable investigation. *Hall,* 106 F.3d at 749.

Here, counsel did not know that the additional records existed; nor was he aware that Wright could be tested for organic brain damage. His decision not to pursue these avenues therefore cannot be characterized as strategy. Furthermore, the court is not convinced that the evidence would have been merely cumulative. During trial, the only evidence the jury heard about these matters came from Wright himself. The jury was likely to disregard his testimony as self-serving; and, to make matters worse, the trial record demonstrates clearly that Wright was an atrocious witness. Thus, what the respondent disregards as cumulative evidence of Wright's background is better characterized as corroboration of otherwise dubious testimony. Moreover, even if the evidence would not have changed the jury's verdict, it might have helped Wright at sentencing. The only evidence defense counsel offered in mitigation was the testimony of Dr. Traugott, who opined that Wright was mentally ill but not insane. The court also considered the evidence put forth at trial, which of course included Wright's testimony about his background. But,

like the jury, the judge might have weighed that evidence more heavily if counsel had offered corroboration.

Simply because counsel did not perform perfectly, however, does not mean he was constitutionally deficient. A defense attorney's investigation need not be unlimited in scope or unerring in execution, but merely reasonable. *Rogers v. Israel,* 746 F.2d 1288, 1294 (7th Cir.1984). Here, although he did not get each and every mental health record, counsel did receive a great deal of information from the state as part of discovery. In addition, Dr. Traugott requested from the state health agency all of Wright's records, and received nearly all of them. So it is not as if counsel ignored obvious avenues in his pursuit of mitigating evidence. As for prejudice, with the exception of Wright's I.Q. scores, the records offered little new information. Thus, even if the evidence of Wright's background had been corroborated, the court cannot conclude that there is a reasonable probability the sentence would have been different.

In sum, the court could not find that counsel was constitutionally deficient without judging him in perfect hindsight. And it could not conclude that his shortcomings prejudiced the outcome of the trial and penalty phases without indulging in impermissible speculation. Wright simply cannot satisfy the rigorous standards set forth in *Strickland,* and the court therefore denies the writ on this claim.

Claim 2: The trial judge erroneously believed he was precluded as a matter of law from considering Wright's traumatic childhood and lifelong history of mental health problems as mitigating evidence in sentencing him

Wright claims that at his sentencing hearing, the trial judge erroneously believed that the law precluded him from

considering Wright's traumatic childhood and lifelong history of mental health problems as mitigating evidence. In support of this argument, Wright points to excerpts from the judge's remarks upon sentencing the defendant. The judge stated, "I don't think any reasonable person who has heard all of the evidence in this case can feel anything but sympathy for the pathetic creature, Patrick Wright, . . . a man who has wandered the forty wretched years of his life from institution to institution, from prison to prison; the evidence indicating that his fetish for women's shoes being perhaps the one and only purpose for his life." Nevertheless, the judge explained, his sympathy arising from the mitigating evidence of Wright's wretched life was "not an appropriate consideration" in deciding whether to sentence him to death. He went on to explain that "any matters dealing with sympathy have no bearing on whether the defendant shall receive the death penalty."

Wright asserts that the judge's statements indicate that he disregarded mitigating evidence about Wright's background because he erroneously believed the law precluded him from doing so. The Supreme Court has explained that "evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse." *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., *concurring*); *see also Penry v. Lynaugh*, 492 U.S. 302, 322 (1989) ("Because Penry was mentally retarded . . . and thus less able than a normal adult to control his impulses or to evaluate the consequences of his conduct, and because of his history of childhood abuse, [a] juror could . . . conclude that Penry was less morally 'culpable than defendants who have no such excuse' ").

Accordingly, in a capital case, the sentencer must not be precluded from considering any mitigating evidence relating to the defendant or the crime. *See, e.g., Eddings v. Oklahoma,* 455 U.S. 104, 111-112 (1982); *Lockett v. Ohio,* 438 U.S. 586, 604 (1978) (plurality opinion). Mitigating evidence is allowed at the penalty phase so the sentencer may consider "compassionate . . . factors stemming from the diverse frailties of humankind." *Woodson v. North Carolina,* 428 U.S. 280, 304, (1976) (plurality opinion). The Court has explained that "[n]othing in any of [its] cases suggests that the decision to afford an individual defendant mercy violates the Constitution." *Gregg v. Georgia,* 428 U.S. at 199 (joint opinion of Stewart, Powell, and Stevens, JJ.); *see also Caldwell v. Mississippi,* 472 U.S. 320, 330-31 (1985).

The state is not, however, forbidden from guiding how the sentencer considers that mitigating evidence. In *California v. Brown,* the Court found that an instruction telling the jury not to be "swayed by 'mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling'" during the sentencing phase did not violate the Eighth Amendment. *See Brown,* 479 U.S. at 542. It concluded that a reasonable juror would interpret the instruction to ignore mere sympathy "as an admonition to ignore emotional responses that are not rooted in the aggravating and mitigating evidence," and that it was not unconstitutional for a state to "prohibi[t] juries from basing their sentencing decisions on factors not presented at the trial." *Brown,* 479 U.S. at 542-43.

Thus, the Court concluded in *Brown* that the Constitution permits the state to forbid the sentencer from considering emotions not based on the evidence. From that conclusion, Wright argues, it follows that the Constitution necessarily requires that the sentencer be allowed to consider and give effect to emotions that are based on the evidence. In *Saffle v. Parks,* 494 U.S. 484 (1990), however, the Court strongly

suggested otherwise. The Court in *Saffle* ultimately rejected the petitioner's claim under *Teague v. Lane*, 489 U.S. 288 (1989). In reaching that decision, however, the Court in dicta disagreed with the petitioner's argument that an anti-sympathy instruction might lead the jury to disregard not only their emotional reaction to mitigating evidence, but also the evidence itself. The Court noted the difference between restricting what mitigating evidence the jury is permitted to consider in making its sentencing determination, and guiding the jury's consideration of that evidence. *Saffle*, 494 U.S. at 490.

The respondent argues that the trial judge did in fact consider all of the mitigating evidence in determining Wright's sentence. He simply decided that sympathy alone was not sufficient to preclude the death penalty. He notes that the trial judge found that Wright acted under extreme emotional disturbance when he committed the crime. That finding, he argues, demonstrates that the judge considered evidence pertaining to Wright's poor mental condition. Moreover, the judge agreed to consider all the evidence presented at trial, which included Wright's testimony about his history.

Wright replies that the statutory factor "extreme emotional disturbance" is distinct from non-statutory mitigating factors such as childhood trauma or a lifelong history of mental health problems. Accordingly, the judge's consideration of Wright's extreme emotional disturbance did not necessarily encompass the other non-statutory mitigating factors.

Moreover, Wright asserts, the judge's additional statements belie the respondent's interpretation that the judge weighed all the mitigating evidence, but merely refrained from allowing his emotional response to that evidence to influence his decision. After stating the limitations he believed applied to his consideration, he went on to say that

he "gave great consideration to whether other mitigating factors exist [and that he was] unable to determine the existence of any mitigating factors within or without the statute with the exception of [the statutory mitigating factor of extreme mental or emotional disturbance at the time of the crime]." This statement unequivocally demonstrates, Wright argues, that the judge did not consider evidence of Wright's traumatic youth and institutionalization in mitigation. From these remarks, Wright concludes that the judge believed he was somehow precluded, as a matter of law, from considering Wright's non-statutory mitigating evidence simply because that evidence also evoked an emotional response of sympathy. In light of those remarks, he asserts, the respondent's argument that the judge considered the evidence but simply disregarded his emotional response thereto is nonsense.

This claim presents a close question. It is very clear under *Brown* that the judge was allowed—and perhaps required—to render his decision based on the evidence and not on his personal emotional response to that evidence. The court therefore does not agree that a court must consider sympathy so long as it is based on evidence. Taken alone, the judge's remark that sympathy was "not an appropriate consideration" in deciding whether to sentence Wright to death suggests that he considered all the evidence but merely disregarded his emotional response.

When considered in light of his other statements, however, his express refusal to consider sympathy is more complicated. As Wright points out, the judge further stated that the only mitigating evidence he found to weigh against the aggravating factors was evidence of Wright's extreme mental and emotional disturbance at the time of the crime. He specifically stated that he could find the existence of no other mitigating factors "within or without the statute." The respondent argues that the extreme mental and emotional disturbance factor encompasses the evidence of

Wright's pitiful life up until that point; but that interpretation renders the words "at the time of the crime" meaningless. Just because the judge considered Wright's mental disturbance at the time of the offense, that does not mean he also considered his traumatic youth. *See Wright I*, 490 N.E.2d at 657 (Clark, CJ., *dissenting*).

The issue before the court has little to do with the proper role of sympathy in capital sentencing decisions. No case requires a court or jury to consider sympathy. If this court were to provide relief on that basis, it would violate the Supreme Court's clear prohibition against the imposition of new rules in habeas cases. *Teague v. Lane*, 489 U.S. 288 (1989) (prohibiting use of new rule of constitutional law established after a petitioner's conviction has become final to attack the conviction on federal habeas corpus unless narrow exceptions apply). But when taken in context, the trial judge's comments that he refused to consider sympathy suggest that he also failed to consider the evidence giving rise to that sympathy. Refusing to consider mitigating evidence violates the mandate of *Eddings*, which was decided the year before Wright's trial. As noted above, the judge specifically stated that he could discern no mitigating factors except for Wright's extreme emotional disturbance at the time he committed the offense. But Wright presented evidence of a horrible childhood; surely that qualifies as mitigation. If the judge considered this evidence, as he was required to do, why would he say that no mitigating factors existed besides Wright's emotional disturbance at the time of the crime? Simply put, he would not. He might find the mitigation of little weight, but he would not say that it did not exist. To derive any other meaning from his plain words requires tortuous reasoning. In sum, the record demonstrates that the trial judge did not consider Wright's mitigating evidence in accordance with the Supreme Court's mandate in *Eddings*. As a result, Wright's death sentence

was imposed unconstitutionally, and he is entitled to relief on this claim.

Claim 3: Wright was deprived of his right to due process of law because the trial court considered and relied upon evidence from outside the record of other murder cases in sentencing Wright to death

Wright asserts that the trial court improperly considered and relied upon extrinsic evidence regarding other murder cases in sentencing Wright to death. Specifically, the judge stated that in all his years of legal experience, he had never encountered a murder case more gruesome and heinous than this one.

Wright argues that the judge's remarks demonstrate that he violated the rule set forth in *Gardner v. Florida,* 430 U.S. 349 (1977). Gardner was convicted of first-degree murder. The jury recommended a life sentence, but the trial judge sentenced Gardner to death. The judge explained that he was relying in part on confidential information contained in the presentence investigation report. This information was not revealed to the parties; thus, Gardner has no chance to deny or explain the information relied upon by the trial judge. The Court ruled that the judge violated the Due Process Clause when he relied on undisclosed information about Gardner.

Wright argues that in his case, the judge effectively relied on undisclosed information when he compared Wright's crime to all the others he had encountered. Wright could not possibly challenge information about other, unrelated cases. In that respect, he claims, the trial judge violated *Gardner*'s prohibition against relying on information not disclosed to the defendant. Moreover, "comparative proportionality review" is not a feature of the capital sentencing process in Illinois, and therefore the judge acted improperly

when he partially based his decision to impose the death penalty by comparing Wright to other offenders. *See People v. Ruiz,* 742 N.E.2d 299, 303 (Ill. 2000).

In response, the respondent notes that *Gardner* did not involve a judge who relied on his own life experiences, but rather on specific, discrete information about the defendant himself. The prohibition announced in *Gardner* applies when the court relies on ex parte information about the defendant without giving him the opportunity to explain the information. The Court has not extended that holding to cases in which the judge relies on his own general life experience in assessing the proper sentence. In *Barclay v. Florida,* 463 U.S. 939 (1983), the trial judge disregarded the jury's recommendation that the defendant be given a life sentence, and imposed the death penalty. In explaining his decision, the judge compared the defendant's crimes to what he had seen as a soldier in World War II while liberating Nazi concentration camps. The Court rejected the defendant's argument that the judge acted improperly by considering his own experiences. It explained that separating the sentencer's decision from his life experiences would transform the sentencing process into a "rigid and mechanical parsing of statutory aggravating factors." *Barclay,* 463 U.S. at 950-51. The Court noted that "[a]ny sentencing decision calls for the exercise of judgment. It is neither possible nor desirable for a person to whom the State entrusts an important judgment to decide in a vacuum, as if he had no experiences."

Here, like the judge in *Barclay,* the judge merely assessed the evidence in the context of his own life experiences, which included exposure to other murder cases. To demand that he ignore those experiences would render the sentencing process precisely the sort of "rigid and mechanical" exercise that the Supreme Court has discouraged. *See also Welch v. Burke,* 49 F.Supp.2d 992 (E.D.Mich.1999) (finding

no error where the trial judge, in non-capital case, commented on the loss of his own child to impart upon the defendant the magnitude of his crime); *People v. Tye,* 565 N.E.2d 931 (Ill. 1990); *cert denied,* 502 U.S. 833 (1991) (finding no error where trial judge in capital case referred to his own experience as a homicide detective in assessing the viciousness of the attack on the victim). Accordingly, Wright is not entitled to habeas relief on this claim.

Claim 4: The Illinois Supreme Court, after finding that the trial court used an improper aggravating factor, erred by failing to re-weigh independently the aggravating and mitigating facts, remand the case, or engage in harmless error analysis

On appeal from the denial of his first post-conviction petition, Wright argued that the trial court erred when it relied partially upon residential burglary to justify imposition of the death penalty. At the time Wright was sentenced, residential burglary was not among the listed felonies that supported the finding of an aggravating factor. Nevertheless, the Illinois Supreme Court found the error not serious enough to warrant a new sentencing hearing in light of the numerous other aggravating factors expressly relied upon by the trial court. *Wright II,* 594 N.E.2d at 290. Wright argues that in so holding, the Illinois Supreme Court violated his rights by failing either to re-weigh independently the aggravating and mitigating facts, remand the case, or engage in harmless error analysis.

The merits of Wright's argument depends on whether Illinois is a "weighing" or a "non-weighing" state. The Supreme Court has held that in a "weighing state," an Eighth Amendment violation occurs when the sentencer weighs an invalid aggravating circumstance in reaching the ultimate decision to impose the death penalty. Thus, when a reviewing court invalidates an aggravating factor, the court must

either re-weigh the evidence without the aggravating factor, or determine that the sentencer's error in weighing the improper factor was harmless. *See Stringer v. Black,* 503 U.S. 222 (1992); *Clemons v. Mississippi,* 494 U.S. 738, 745 (1990). Wright argues that Illinois is a weighing state; and therefore his Eighth Amendment rights were violated when the reviewing court did not re-weigh the evidence despite the trial court's partial reliance on an improper factor. *See Morgan v. Illinois,* 504 U.S. 719, 721-22 (1992) (describing the "balance" of aggravating and mitigating factors that occurs at the second stage of an Illinois capital sentencing hearing).

Wright misconstrues Illinois' capital sentencing scheme. Illinois is not a weighing state. A weighing state is one in which the sentencer may not consider any evidence in aggravation except for the statutory factors used at the eligibility phase. *Stringer v. Black,* 503 U.S. 222, 229-30 (1992). Both the Illinois Supreme Court and the Seventh Circuit have recognized that Illinois is a non-weighing state. *People v. Shaw,* 713 N.E.2d 1161, 1182 (Ill. 1999) (*citing* 720 Ill.Comp.Stat. § 5/91(c) (West 1996)). *Coleman v. Ryan,* 196 F.3d 793, 799 (7th Cir.1999), *cert. denied,* 121 S.Ct. 120 (2000). Non-weighing capital sentencing jurisdictions are governed by *Zant v. Stephens,* 462 U.S. 862 (1983). Under Zant, a death sentence may still be valid even though imposed by a sentencer who finds the existence of an aggravating factor that is later found invalid. Specifically, the death sentence is valid if the state does not attach additional significance to multiple aggravating factors or to one aggravating factor over another, where the purpose of the still-valid aggravating factors was to narrow the class of persons eligible for the death penalty, and where state law provides for meaningful review of every death sentence. Because Illinois' sentencing scheme does not place any special emphasis on one particular aggravating factor over another, its scheme fits into the *Zant* mold. Moreover, the

aggravating factors only serve to narrow the class of persons eligible for the death penalty, and Illinois provides mandatory and meaningful review of each capital conviction. *See People v. Hampton,* 594 N.E.2d 291 (1992). Thus, Illinois' sentencing scheme does not make it a "weighing state" subject to the requirements set forth in *Stringer,* 503 U.S. at 229-32.

In Wright's case, the trial judge found several valid factors in aggravation. He found that the crime was premeditated, that the victims were defenseless, and that Wright's powers of reason were sufficient to allow him to conceal evidence just one hour after he committed the crimes. *Wright II,* 594 N.E.2d at 290. Because these other valid factors existed, under *Zant,* the Illinois Supreme Court need not have conducted a re-weighing or harmless error analysis. Accordingly, a new sentencing hearing is not required on this claim.

Claim 5: The trial judge who presided over Wright's trial and sentenced him to death had a conflict of interest arising from his role as the prosecutor in Wright's 1979 armed violence conviction, which was relied upon by the judge as an aggravating factor

In 1979, Wright was charged in Coles County with burglary, armed violence, escape, and criminal damage to property. The prosecutor in that case was Paul C. Komada, who was at that time the State's Attorney for Coles County. If convicted on all counts, Wright would have faced a lengthy prison term. However, Komada made a plea offer to Wright's attorney, Nancy Owen, allowing Wright to plead guilty to one count of armed violence and serve a sentence of seven years in prison. Wright accepted the plea offer and was eventually released on December 12, 1982, after serving three years in prison. The crimes at issue in this case were committed just six months later, on June 7, 1983.

Komada, the prosecutor in the 1979 case, became a trial judge and presided over this case. In sentencing Wright to death, he considered in aggravation the 1979 armed violence conviction. Wright alleges that the trial judge had a conflict of interest arising from his role as the prosecutor in the 1979 armed violence case. Certain practices that may be acceptable in noncapital sentencing proceedings are flatly prohibited "in a case in which the judge has decided to sentence the defendant to death." *Gardner,* 430 U.S. at 357. Wright suggests that Judge Komada may have regretted his decision to enter into the plea agreement in 1979, as it allowed Wright to be released from prison earlier than he would have otherwise. Moreover, Wright points out, Judge Komada was acquainted with the victim; these factors may have contributed to his decision to sentence Wright to death.

The respondent asserts that Wright has procedurally defaulted this claim. Wright disputes this assertion. In any event, the court need not address the issue of procedural default because the claim lacks merit. The Seventh Circuit has rejected an argument that a per se rule disqualifies a judge from presiding over a trial of a capital defendant whom the judge had previously prosecuted. *Del Vecchio v. Illinois Dept. of Corrections,* 31 F.3d 1363, 1375 (7th Cir. 1994) (en banc). The *Del Vecchio* court held that the defendant must demonstrate actual bias on the part of the judge to show a due process violation. *Del Vecchio,* 31 F.3d at 1375. Wright distinguishes this case from *Del Vecchio* by pointing out that the trial judge in that case only presided over a jury sentencing hearing, while in this case, the judge made the decision. But, as the respondent notes, the holding of *Del Vecchio* was in no way limited to cases in which the trial judge presides over a jury rather than bench sentencing. Wright merely speculates when he asserts that the judge imposed the death penalty because he felt guilty; and speculation is insufficient to establish actual bias. Ac-

cordingly, the court must deny Wright relief on this claim as well.

Claim 6: Wright was deprived of his right to due process of law because the prosecutor in this case had represented Wright in the 1979 armed violence charge

Wright's sixth claim also stems from his 1979 armed violence conviction. His defense attorney in that case was Nancy Owen, who was at that time Coles County's Public Defender. It was Owen who negotiated the plea agreement that allowed Wright to serve only a seven-year sentence.

In 1980, however, she became the Coles County State's Attorney, and prosecuted Wright for the crimes at issue in this case. During the guilt phase of the trial, she impeached Wright with his 1979 conviction, and later used it in aggravation at sentencing. Defense counsel objected both at trial and in a post-trial motion, but the judge allowed the fact of the conviction to be used against Wright. In her deposition, she stated that after the 1983 crimes, she thought, "if the state had asked for more time before [in the 1979 prosecution], he wouldn't have been out to kill Carol Specht in '83." Owen also had attended high school with the victim, Carol Specht. These circumstances, Wright argues, gave rise to a conflict of interest.

As with Wright's fifth claim, the respondent asserts that Wright has procedurally defaulted this claim; and Wright again disputes that assertion. However, as with the previous claim, the court need not address the procedural default issue in this claim because it too lacks merit.

In *Havens v. Indiana,* Havens brought a habeas petition challenging his state court conviction for burglary and the state court's finding that he was a habitual offender. *Havens v. Indiana,* 793 F.2d 143 (7th Cir.1986). He asserted that he had been denied due process because the

trial court refused to disqualify the prosecutor, who had represented Havens on unrelated charges four and five years earlier. The Seventh Circuit recognized the ethical complications inherent in the situation, and acknowledged that recusal would have been the better decision. Nevertheless, the court found no constitutional violation. The court noted that the earlier convictions were based on charges wholly unrelated to the burglary charge. The prosecutor's questions on cross-examination pertained to matters of public record, and did not involve confidential information. Moreover, Haven failed to prove that the prosecutor used to the state's advantage special facts or knowledge gained from the prosecutor's past representation of him. *Havens,* 793 F.2d at 145.

Likewise, in this case, the earlier charges had nothing to do with the crimes at issue here. But even more significantly, the record does not suggest that Owen obtained during her earlier representation of Wright sensitive information that could have been used against him in this case. Owen merely used the fact of Wright's previous conviction for impeachment and aggravation; this fact was a matter of public record. Accordingly, Wright is not entitled to relief on this claim.

Claim 7: *The Illinois Death Penalty Statute is unconstitutional*

In his final claim, Wright asserts that Illinois' death penalty statute is unconstitutional. He concedes that the Seventh Circuit has upheld the constitutionality of Illinois' death penalty, but wants to preserve the issue in case that holding is reversed. *See Sanchez v. Gilmore,* 189 F.3d 619 (7th Cir.1999), *cert. denied,* 529 U.S. 1089 (2000). Under *Sanchez,* this court must deny relief on Wright's seventh claim as well.

CONCLUSION

For the foregoing reasons, this court grants Wright's petition with respect to his death sentence, but denies the petition in all other respects. This court hereby vacates Wright's sentence of death. The state shall have 120 days from the issuance of this order to re-sentence Wright. On the court's own motion, execution of this order is stayed pending appeal by the parties.

[Dated June 6, 2002]

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 01-3066, 01-3157

PATRICK WRIGHT,

Petitioner-Appellee/Cross-Appellant,

v.

JONATHON WALLS,

Respondent-Appellant/Cross-Appellee.

Appeals from the United States District Court
for the Central District of Illinois.
No. 93 C 2105—Harold A. Baker, *Judge*.

On Petition for Rehearing
and Petition for Rehearing En Banc

Before FLAUM, *Chief Judge*, and EASTERBROOK and WILLIAMS, *Circuit Judges*.

On consideration of the petition for rehearing and petition for rehearing en banc filed by respondent-appellant, no judge in active service has requested a vote thereon, and the majority of judges on the original panel have voted to deny a rehearing. Circuit Judge Easterbrook voted to grant rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be DENIED.

EASTERBROOK, *Circuit Judge*.

I would grant the petition for rehearing to consider the bearing of *Saffle v. Parks*, 494 U.S. 484 (1990), which neither the majority nor my dissenting opinion discussed. (The fault is not the state's, for Illinois cited *Parks* in its appellate briefs and again in its petition for rehearing. But Wright did not respond on either occasion and has never explained how his position can be reconciled with that decision.)

The judge in *Parks* instructed the jurors that, when deciding whether to impose (or refrain from imposing) a capital sentence, "[y]ou must avoid any influence of sympathy, sentiment, passion, prejudice, or other arbitrary factor". *Id.* at 487. A reasonable jury could have understood the reference to "sympathy" to include sympathy generated by Parks's broken home and unhappy childhood. Parks argued that this instruction violated the rule [of] *Eddings v. Oklahoma*, 455 U.S. 104 (1982), but the Supreme Court held that an anti-sympathy instruction is compatible with *Eddings*, provided that the court allows the defendant to introduce into evidence all factors the defendant believes to be mitigating. 494 U.S. at 489-93. Next the Court considered whether *Eddings* might be extended to condemn an anti-sympathy instruction and held that no such modification would be proper on collateral review. 494 U.S. at 493-95, relying on *Teague v. Lane*, 489 U.S. 288 (1989).

The similarity between *Parks* and this case is marked. Just as in *Parks*, the judge admitted all evidence that the defendant offered in mitigation. As in *Parks*, the sentencer

was legally permitted to consider all of that evidence. Finally, the sentencer in this case remarked:

> [A]ny matters dealing with sympathy, outrage, who the victim was, all the matters I just mentioned have no bearing on whether the defendant shall receive the death penalty. And again, I note for the record that I have cited them so the record is clear that I have rejected them, and I have disregarded them in making my decision.

That statement is closer in spirit to the jury instruction that *Parks* held valid than to the legal prohibition that *Eddings* held invalid.

Parks restated the "precise holding" of *Eddings*: "that the State cannot bar relevant mitigating evidence from being presented and considered during the penalty phase of a capital trial." 494 U.S. at 490. Illinois did not transgress this "precise holding" because no rule of state law prevented Wright's childhood from being received in evidence and playing a role in the aggravating-mitigating calculus. In Wright's case this evidence not only was admitted but also played a major role, for the sentencing judge concluded that Wright's childhood had led to "extreme mental or emotional disturbance" that the judge deemed to be mitigating—though not sufficiently so to outweigh the many aggravating factors.

My colleagues believe that *Eddings* should be extended so that a capital sentence is valid only if the sentencer's statements demonstrate beyond peradventure that all admissible mitigating evidence has been considered—which as a practical matter means that the sentencer must announce expressly that this has been done (see 288 F.3d 937, 943 n. 4). For reasons given in my earlier opinion, and in *Mickens v. Taylor*, 22 S.Ct. 1237 (2002), a demand along these lines is something that a federal court may make of

a federal administrative law judge but not of the state's judiciary. Still, no matter how we evaluate that possibility on the merits, *Parks* holds that any extension of *Eddings* may occur only on direct appeal. Wright therefore is not entitled to collateral relief.